United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2316

To be argued by
DANIEL J. BELLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2316

B
P/S

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALAN C. SOLOMON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DANIEL J. BELLER,
JOHN D. GORDAN, III,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

PAGE

PAGE

PAGE

OTHER AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2316

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALAN C. SOLOMON,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Alan Solomon appeals from a judgment of conviction entered on September 12, 1974, in the United States District Court for the Southern District of New York, after a trial without a jury upon a stipulated statement of facts before the Honorable Robert L. Carter, United States District Judge.

Indictment 73 Cr. 693 was filed in eighteen counts on July 16, 1973. Count One charged Arthur Levine, Sol Leit, Alan Solomon, Joel Kubie and Robert Lynn, respectively the Chairman of the Board, President, Treasurer, Comptroller and Assistant Comptroller of Weis Securities, Inc. ("Weis"), a brokerage firm and member of the New York and American Stock Exchanges, with a conspiracy to commit securities fraud and mail fraud by violating record-keeping and other regulations of the Securities Exchange

Commission issued under the Securities Exchange Act of 1934 (Title 15, United States Code, Sections 78j (b) and 78q (a), and set forth in 17 C.F.R., Sections 240.10 b-5 and 240.17a-3). Counts Two through Ten charged the defendants with unlawfully making and maintaining false books and records (Title 15, United States Code, Sections 78q (a) and 78f (f), 17 C.F.R., Sections 240.17a-3, and Title 18 United States Code, Section 2). Counts Eleven through Thirteen charged the defendants with unlawfully using the mails to commit a fraud in the sale of securities (Title 15, United States Code, Sections 78j (b), 78f (f), 17 C.F.R. Section 240.10-b (5) and Title 18, United States Code, Section 2). Counts Fourteen through Sixteen charged the defendants with mail fraud (Title 18, United States Code, Sections 1341 and 2). Count Seventeen charged Levine, Leit, Kubie and Lynn, with filing false financial statements, in violation of the securities laws. Count Eighteen charged Arthur Levine with unlawfully and wilfully affirming the truth of false financial statements which were filed by Weis Securities, Inc., pursuant to regulations of the Securities Exchange Commission (Title 15, United States Code, Section 78q (a) and 78f (f), 17 C.F.R. Sections 240.17a-5 and Title 18, United States Code, Section 2).

On July 3, 1974, Alan Solomon waived a jury and went to trial on Count 7 of the indictment upon a stipulated statement of facts. Solomon was found guilty by the court and was sentenced on September 12, 1974, to a one year term of probation and a five thousand dollar committed fine.*

---

* Arthur Levine pleaded guilty on March 19, 1974, to Count One of the Indictment and to Information 74 Cr. 273, charging a substantive violation of the securities law. He was sentenced on September 24, 1974, to six months imprisonment and a two-year term of probation.

Sol Leit pleaded guilty on May 29, 1974, to Count One of the Indictment and to Information 74 Cr. 553, charging a substantive

[Footnote continued on following page]

Statement of Facts

Count Seven of the indictment charged Alan Solomon with aiding and abetting in the false making and maintaining of books and records of Weis Securities, Inc. by recording a purchase by Weis of Pan American 1984 bonds at 4½%, when in fact Weis had purchased bonds having a substantially lower value, with the result that the stated worth of Weis' unrealized income was inflated by approximately $200,000.00.

The facts were not disputed at trial. Certain documentary exhibits were offered in evidence along with a stipulated statement of facts and the testimony of Alan Solomon before the New York Stock Exchange, given May 17, 1973, in which Solomon admitted his participation in the offense charged in Count Seven (App. 371a; GX 1). Solomon does not challenge the sufficiency of the evidence at trial.

Prior to trial Solomon moved to suppress his New York Stock Exchange testimony. By order with opinion filed April 17, 1974, Judge Carter denied the motion without prejudice to the holding of an evidentiary hearing. A hearing was held on June 13 and 14, 1974, and upon its conclusion Solomon renewed the motion to suppress. Judge Carter again denied the motion in an order with opinion filed June 28, 1974. To preserve the issue for appeal while at the same time avoiding the necessity for a full trial on the indictment the Government and the defendant agreed

---

securities law violation. He was sentenced on September 23, 1974, to a three-year term of probation.

Joel Kubie pleaded guilty on May 29, 1974, to Count One of the Indictment. He was sentenced on September 24, 1974, to six months imprisonment and a two-year term of probation.

Robert Lynn, pleaded guilty on June 20, 1974, to Count Seventeen of the Indictment and to Information 74 Cr. 621 charging a substantive violation of the securities law. He was sentenced on September 25, 1974, to a two-year term of probation.

to a bench trial on stipulated facts, and Solomon's Exchange testimony was made a part of the record at trial. After entry of the judgment of conviction on September 12, 1974, all open counts in the indictment with respect to Solomon were dismissed with prejudice.

ARGUMENT

POINT I

The Court properly denied Solomon's motion to suppress his New York Stock Exchange testimony.

Introduction

The New York Stock Exchange ("Exchange") first learned of financial problems at Weis Securities, Inc., on April 12, 1973, when two officers of the firm, Levine and Leit, reported capital difficulties to the Exchange (Tr. 5-6).* Exchange examiners were sent to Weis and by April 27, 1973, discovered certain irregularities in its accounts. Subsequently, on May 10 and 11, 1973, Joel Kubie, Weis' Comptroller, testified before the Exchange and exposed a series of fraudulent practices involving himself, Levine, Leit, Solomon and Lynn (GX 3). On May 14, 1973, Robert Lynn, Assistant Comptroller at Weis, testified before the Exchange (GX 2). On May 16, the Securities Exchange Commission ("SEC"), which had previously been notified, as required by law, of the irregularities at Weis, subpoenaed all transcripts of testimony from the Exchange (Tr. 126). The following day, May 17, Alan Solomon testified before the Exchange (GX 1). Kubie testified once again before the Exchange on May 22, 1973.

---

* "Tr." refers to the hearing transcript; "GX" to Government Exhibits at the hearing; "DX" to Defense Exhibits; "Br." to appellant's brief; "App." to appellant's appendix.

The SEC investigation proceeded simultaneously with the full cooperation of Kubie and Lynn. On May 24 the SEC instituted an injunctive action against Weis and requested that the firm be placed in receivership (Tr. 157, 174). The matter was subsequently discussed with the United States Attorney's Office for the Southern District of New York on June 1, 1973 and the indictment in this case was filed on July 16, 1973 (Tr. 161).

On appeal, Solomon challenges the admission in evidence at trial of his Exchange testimony on the ground that it was "compelled" within the meaning of the Fifth Amendment and, accordingly, that such testimony could not be used to incriminate him. Pointing to Article XIV, Section 9 of the New York Stock Exchange Constitution, which subjects an allied member of the Exchange to expulsion or suspension for failure to testify when called before the Exchange, Solomon alleges that, faced with this threat to his future employment, he had no choice but to testify before the Exchange. Relying upon a line of cases from *Garrity* v. *New Jersey*, 385 U.S. 493 (1967) to *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973),* Solomon argues that his testimony was involuntary and therefore inadmissible at the trial of the criminal indictment.

Recognizing that in the absence of governmental action on the part of the Exchange any claim under the Fifth Amendment must fail, the principal thrust of Solomon's brief is to establish that the Exchange was performing a "Governmental policing function" in conducting hearings into Weis' financial collapse (Br. 20). Accordingly, Solo-

---

* *See also, Spevack* v. *Klein*, 385 U.S. 511 (1967); *Gardner* v. *Broderick*, 392 U.S. 273 (1968); and *Sanitationmen* v. *Sanitation Commissioner*, 392 U.S. 280 (1968). These cases, and those in the text, hold that testimony compelled before a governmental investigative body upon a threat of substantial economic coercion is involuntary and therefore inadmissible at a subsequent criminal proceeding. The cases are fully discussed *infra*, at 8-11.

mon argues first, as a matter of law--specifically the Securities Exchange Act of 1934—and second, on the facts of this case, the Exchange was performing substantial governmental investigative functions delegated to it under the Act and by the Securities and Exchange Commission.

Neither claim has any merit.

1. The New York Stock Exchange functions as a private self-regulating organization under the Securities Act of 1934.

Solomon argues that the Securities Exchange Act of 1934 and regulations of the S.E.C. delegate investigating authority to the Exchange, thereby transforming an otherwise private business association into the "alter-ego" of the S.E.C. This argument totally misconstrues the statutory and regulatory scheme and purpose of the 1934 Act.

The New York Stock Exchange, founded in 1792, one hundred and forty-two years prior to passage of the Securities Exchange Act, has always had the power, like any other private organization, to establish rules and regulations for self-disciplinary purposes.* The 1934 Act did not create or establish any new power in the Exchange. Instead, the language of the Act unmistakably leaves the duty of regulating Exchange practices where it always was, with the Exchange itself. 15 U.S.C. §§ 78f (a), (b) and (d).**

---

* "The exchanges are by their nature bodies with a limited number of members, each of which plays a certain role in the carrying out of an exchange's activities. The limited entry feature of exchanges led historically to their being treated by the courts as private clubs, *Belton* v. *Hatch*, 109 N.Y. 593, 17 N.E. 225 (1888), and to their being given great latitude by the courts in disciplining errant members . . ." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 350-51 (1963).

** 15 U.S.C. § 78f(a) provides for registration of national exchanges. § 78f(b) provides that no registration shall be issued

[Footnote continued on following page]

The Supreme Court reached the same conclusion after reviewing the legislative history of the 1934 Act in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963). The Court concluded that despite passage of the Act, Congress intended that Exchange regulation remain a matter of *private,* non-governmental ordering:

> "The pattern of governmental entry, . . . was by no means one of total displacement of the exchanges' traditional process of self-regulation. The intention was rather, as MR. JUSTICE DOUGLAS said, while the Chairman of the S.E.C., one of 'letting the exchanges take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used.' Douglas, Democracy and Finance (Allen ed. 1940), 82. Thus the Senate Committee Report stressed that 'the initiative and responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain with the exchanges themselves. It is only where they fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so.' S. Rep. No. 792, supra, at 13. The House Committee Report added the hope that the bill would give the exchanges sufficient power to reform themselves without intervention by the Commission. H.R. Rep. No. 1383, supra, at 15. See also 2 Loss, Securities Regulation (2d ed. 1961), 1175-1178, 1180-1182.

"unless the rules of the exchange include provision for expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade . . ." § 78f(d) allows for the registering of an exchange if "the rules of the exchange are just and adequate to insure fair dealing and to protect investors. . . ."

> Thus arose the federally mandated duty of self-policing by exchanges."

Id. at 352; *See* also *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware,* 414 U.S. 117, 125-131 and n. 9 (1973). In sum, the Act speaks of "self-policing" by the Exchange not, as suggested by Solomon, of "governmental policing." *

Nothing in the *Garrity* line of cases, relied on by Solomon, remotely suggests that the statutory scheme involved in this case is sufficient to trigger application of the use-immunity protection inherent in the Fifth Amendment. *Cf. Kastigar* v. *United States,* 406 U.S. 441 (1972). In fact, a careful reading of *Garrity* and its progeny reveals a conclusive distinction between those cases and this one.

In *Garrity,* New Jersey policemen were called before a special investigative inquiry conducted by the State Attorney General pursuant to a direct order by the New Jersey Supreme Court, looking into alleged irregularities in the state's municipal courts. The officers were advised that any testimony they gave could be used against them and that they had a right to refuse to answer. They were cautioned, however, that failure to testify would subject them to removal from office. They testified and were prosecuted for conspiracy to obstruct the administration of traffic laws at least in part on the basis of their testimony. The Court concluded that "[t]he choice given petitioners was either

---

* Under Section 19(b) of the Act, the Securities and Exchange Commission is empowered to order changes in certain exchange rules, 15 U.S.C. § 78s(b). "In 1941, the Commission's proposals for statutory amendments included a specific request to extend § 19(b) rule-making authority over rules governing discipline of members. Report of the Securities and Exchange Commission on Proposals for Amendments to the Securities Act of 1933 and the Securities and Exchange Act of 1934. . . . The proposal was not acted upon." *Silver* v. *New York Stock Exchange, supra,* 373 U.S. at 369, n. 2, (Stewart, *J.*, dissenting). *Compare Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973); *Gordon* v. *New York Stock Exchange, Inc.,* 498 F.2d 1303 (2d Cir. 1974).

to forfeit their jobs or to incriminate themselves. . . . We think the statements were infected by the coercion inherent in the scheme of questioning and cannot be sustained as voluntary. . . ." 385 U.S. at 497-98.

Gardner v. *Broderick,* 392 U.S. 273 (1968), involved the dismissal of policemen who refused to waive immunity before a grand jury investigating allegations of bribery and corruption in the police department. The dismissals were ruled invalid on the ground that the witnesses were not informed their testimony would be immunized. *See also Spevack* v. *Klein,* 385 U.S. 511 (1967). In *Sanitationmen* v. *Sanitation Commissioner,* 392 U.S. 280 (1968), in considering proceedings before the New York City Commissioner of Investigation inquiring into kickback schemes, the Court concluded that dismissal of sanitation men for refusal to testify could be constitutionally justified only if such testimony were immunized. *See also Uniformed Sanitation Men's Association* v. *Commissioner,* 426 F.2d 619 (2d Cir. 1970), *cert. denied,* 406 U.S. 96 (1972).*

Taken together the *Garrity* line of cases concludes that (a), if an individual whose economic livelihood depends, in some substantial way, on government employment or licensing, (b), is called before an official investigating body, and (c), is threatened with loss of that livelihood for failure to testify, his subsequent testimony must be accorded use-immunity.**

---

* The principle was recently extended by the Supreme Court in *Lefkowitz* v. *Turley,* 414 U.S. 70 (1973), to reach two architects with extensive municipal contracts who faced loss of the right to receive such contracts for five years for their refusal to waive immunity before a New York Grand Jury investigating charges of bribery, larceny and conspiracy.

** The Government concedes that the potential economic loss in this case is substantial. Solomon's reliance, however, on *United States ex rel. Sanney* v. *Montanye,* 500 F.2d 411 (2d Cir.

[Footnote continued on following page]

Solomon, of course, was not an actual government employee. Nor is his position as an officer in a private brokerage firm, trading in the private securities market, comparable to the situation of the witnesses in *Lefkowitz* v. *Turley, supra,* who had extensive municipal contracts and who could therefore be considered *de facto* municipal employees. But more importantly, the New York Stock Exchange, the investigating body in this case, can hardly be compared to the grand jury involved in *Turley* and *Gardner,* to the Special Attorney General's Investigating Committee in *Garrity,* or to the New York City Commission in Investigation in *Sanitation Men.* Here the Exchange was investigating the financial position of Weis consistent with its duty of self-regulation "to insure fair dealing and to protect investors," 15 U.S.C. § 78f(d), whereas in the *Garrity* cases, the investigative authority was investigating allegations of criminal activity and malfeasance of public office.

1974) is misplaced. In *Sanney* this Court concluded that incriminating statements given to a polygraph examiner employed by a private commercial firm but acting on behalf of police officers, were admissible in evidence, despite the fact that Sanney's continued employment was conditioned upon his submitting to the polygraph examination. The Court concluded that the economic threat in *Sanney* was insubstantial. However, the question of governmental involvement, which is crucial to this case, was conceded in *Sanney.* There, the polygraph examiner, after learning from Sanney of his involvement in a murder, went to the police who asked him to question Sanney again, wired with an electronic device which allowed the police to overhear the conversations in an adjoining room. The state involvement in *Sanney* was overwhelming and is not comparable to this case. Thus, *Sanney* provides no guidance or teaching applicable to this case.

Dictum in the *Sanney* opinion appears to extend the *Garrity* principle to individuals whose employment is wholly private and does not depend in any way on the government, *Id.* at 414-416. Since the dictum does not affect the critical issue of this case, namely governmental involvement in the inquiry, we do not address it.

As a practical matter, this distinction in the function of the investigative body here and in the *Garrity* cases is critical. Solomon seeks to establish a rule that would immunize from use in a criminal prosecution all testimony taken before any registered exchange. It is clear, however, that Exchanges are not law enforcement institutions, and that their investigative activities are not subject to control by any law enforcement body. To establish a rule that gives a private stock exchange the unreviewable power to grant immunity from prosecution would frustrate the intent of Congress as expressed not only in the 1934 Act but as recently articulated in passage of the general immunity statute as part of Title II of the Organized Crime Control Act of 1970, 18 U.S.C. Sections 6001-6005.

Enactment of the general immunity statute resulted in the repeal of approximately forty separate immunity statutes of specific application, *see, e.g.,* 15 U.S.C. § 49 (Federal Trade Commission Act), 42 U.S.C. § 405(f) (Social Security Act), 47 U.S.C. 409(1) (Communications Act of 1934). Among those statutes repealed were Title 15, U.S.C. §§ 77v(c) and 78u(d), immunity provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, and Title 15 U.S.C. § 80b-9(d), the immunity provision in the Investment Advisers Act.*

---

* The language of all three statutes was identical and read in pertinent part as follows:

> "No person shall be excused from attending and testifying . . . before the [Securities and Exchange] Commission, or in obedience to the subpoena of the Commission . . . in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any transaction, matter, or thing concerning which he is compelled, *after having claimed his privilege against self-*

[Footnote continued on following page]

The new immunity statute adds two elements not found in the old immunity provisions. An agency immunity grant must now be approved by the Attorney General; and immunity may be offered only after a finding that the witness' testimony "may be necessary to the public interest," 18 U.S.C. § 6004. In so providing, Congress clearly expressed a preference for review of all grants of immunity by the chief law enforcement official of the United States and for a narrowing of the basis for granting immunity in agency proceedings.

18 U.S.C. Section 6001(1) defines "agency for the purposes of the immunity statute. The SEC is included within the term; the national exchanges are not. Under Solomon's view of this case, the Exchange would be held to a

---

incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying (emphasis added)."

There provisions have been supplanted by 18 U.S.C. § 6004 which provides as follows:

"§6004. Certain Administrative proceedings.

(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States [see 18 U.S.C. § 6001(1)], the agency may, *with the approval of the Attorney General*, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination. . . .

(b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment—

(1) *the testimony or other information from such individual may be necessary to the public interest;* and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination (emphasis added)."

less strict standard than the Commission and indeed would be free to grant immunity to any witness it chose to call before it without review by the Attorney General and without a determination that the grant of immunity is in the public interest. It can hardly be argued that such was the intent of Congress.

If mere general regulation of a private industry were the touchstone of Governmental activity for purposes of Fifth Amendment privilege against self-incrimination, the rule advocated by Solomon would have implications reaching far beyond the securities field. If this Court were to establish a rule that statements given by an employee of a firm in a regulated industry are involuntary and therefore immunized from use in a criminal prosecution where the statement is given upon a threat by the employer of loss of employment, employees in the regulated fields of banking, communications, pharmaceuticals, and interstate commerce, to name but a few, could all be expected to take advantage of such "immunity baths," thereby insulating themselves from subsequent criminal prosecution.*

---

* Consider in the following hypothetical the practical consequence of the rule which Solomon advances here. One month after this Court adopts Solomon's position a major exchange firm collapses and the exchange requests the Treasurer of the firm to appear and testify. Suspecting the possibility of criminal fraud, both the SEC and the United States Attorney's Office remind the Exchange that if they proceed with the Treasurer's testimony it may not be used against him. Both indicate that their suspicion about criminal activity is only that, a suspicion, and that no independent source has yet been developed. Accordingly, both ask the Exchange not to proceed with the examination of the witness. The Exchange, however, pointing to its duty to regulate itself and protect the investing public concludes that it must go ahead with the testimony. The clear effect of immunizing such testimony is to take the power of granting immunity away from public, law-enforcement officials and place it in the hands of private individuals. This is hardly a request to be desired, even apart from the possibility of collusion, in the context of stock

[Footnote continued on following page]

Thus, Solomon's contention—that the Exchange and the SEC are inextricably linked by the statutory scheme as a matter of law and that the rule in *Garrity* should apply to the Exchange—is not supported by the cases on which Solomon relies, by the language of the 1934 Act, by public policy or by common sense.*

---

exchange proceedings. Similar consideration apply, of course, to the numerous other private industries which operate under some form of government regulation.

Solomon's reliance on cases such as *Crimmins* v. *American Stock Exchange*, 346 F. Supp. 1256 (S.D.N.Y. 1972) and *Intercontinental Industries Inc.* v. *American Stock Exchange*, 452 F.2d 935 (5th Cir. 1971), *cf. Zuckerman* v. *Yount*, 362 F. Supp. 858 (N.D. Ill. 1973), reflects an all-or-nothing approach that is inappropriate to the constitutional analysis required for resolution of this case. The cases cited establish the general principle that national exchanges must provide the rudiments of due process to individuals who are denied membership or participation in exchange activities. But a judgment that governmental involvement in exchange affairs may be sufficient to trigger certain constitutional protections for *some* purposes, does not imply that the exchanges must be considered governmental agencies for all purposes. *Silver* v. *New York Stock Exchange*, *supra*, is a case in point. The question in *Silver* was whether the Securities Exchange Act of 1934 created a governmental duty of exchange regulation so pervasive as to constitute an implied repeal of the antitrust laws, 373 U.S., at 347. The Court held that while the Exchange was required to provide certain procedural protections to individuals excluded from exchange activities, the process of regulation was left to industry, not Government, and, accordingly, provisions of the antitrust laws continued to apply to the Exchange essentially as they apply to any private industry. Thus, the Court must have reasoned that the Exchange was "governmental" for some purposes, but not for all. *Cf. Sloan* v. *New York Stock Exchange*, 489 F.2d 1, 4 (2d Cir. 1973). Simply because the exchanges must provide basic due process guarantees to affected individuals does not suggest that the full force of the Fifth Amendment privilege against self-incrimination must necessarily apply as well.

* Solomon directs the Court's attention to such well-known "state action" racial discrimination cases as *Burton* v. *Wilmington*

[Footnote continued on following page]

2. The Exchange did not perform governmental functions in behalf of or in collusion with the SEC in this case.

Failing to establish that the Exchange operates as a government agency as a matter of law in all cases, Solomon suggests on appeal, as he did below, that at least in this case the interrelationship between the Exchange and the Commission was so great that the Exchange must be seen to have been acting in behalf of the Commission.

Solomon's brief accurately relates the facts of the Weis investigation. But by Solomon's own statement, the SEC was conducting "its own coordinate investigation" (Br. 30). Testimony at the pre-trial suppression hearing before Judge Carter indicated that although the Commission was kept informed of the Exchange's Weis investigation, the Commission's investigation was spurred, not by activities of the Exchange, but by contacts between Milton Gould,

---

Parking Authority, 365 U.S. 715 (1961) and *Evans* v. *Newton*, 382 U.S. 296 (1966). Leaving aside the question whether a different standard in determining "state action" applies in racial discrimination cases, the teaching of *Burton* is that the facts of each case must be considered on their own. *See also Male* v. *Crossroads Associates*, 469 F.2d 616, 620 (2d Cir. 1972). When turning to the facts, however, Solomon demonstrates only that the New York Stock Exchange is registered with the SEC and therefore subject to regulation by the Securities Exchange Act. But regulation alone is not sufficient to establish "state action," *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 176-177 (1972); *Powe* v. *Miles*, 407 F.2d 73 (2d Cir. 1968). *Cf. Male* v. *Crossroads Associates*, *supra*, at 621.

Finally, in a different context courts have rejected the view that Exchange rules have the same force as legislative provisions. Where private individuals have sought to establish a claim of civil liability against a securities broker for violation of an Exchange rule or regulation, likening the regulation to Commission Rule 10(b)-5 and Section 10(b) of the Act, the claim has been rejected. *See Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178 (2d Cir. 1966); *Mercury Investment Co.* v. *A. G. Edwards & Sons*, 295 F. Supp. 1160 (S.D. Texas 1969).

outside counsel to Weis, and William Moran, New York Regional Administrator of the SEC, on May 14, 1973. At that time Gould informed Moran of the Weis fraud (Tr. 147-149). On May 15, the Commission obtained a formal order to conduct its own investigation. Exchange transcripts were subpoenaed on May 16 (Tr. 126); the following day, Lynn's and Kubie's testimony was forwarded to the Commission. Solomon, appearing with counsel, testified on May 17 before the Exchange. On May 24, prior to receiving the transcript, the Commission initiated civil proceedings against Weis. Shortly thereafter, on June 1, the Commission had its first substantive discussion about the case with the United States Attorney's Office. Solomon's Exchange testimony was not forwarded to the Commission until on or about that date (Tr. 171-172).

Judge Carter found that the Exchange initiated its investigation in an effort to ascertain the nature of Weis' financial problem and to protect Weis' customers from further loss (App. 366a). The Court also concluded that the Exchange was not a conduit for passing information to the SEC, and that the Commission's knowledge of criminal activity at Weis came from Gould, not the Exchange (App. 366a). Finally, Judge Carter found that the Exchange and the Commission acted in good faith and did not use the Exchange's hearing procedures or the Commission's civil process to gather evidence for a criminal proceeding (App. 367a-368a). These findings were fully supported by the record and demonstrate that the Exchange acted not in behalf of the Commission but independently, in accordance with its own self-regulation procedures. Accordingly, the Court properly denied Solomon's motion to suppress his Exchange testimony. *See United States* v. *Kordel,* 397 U.S. 1 (1970); *Donaldson* v. *United States,* 400 U.S. 517 (1971); *United States* v. *Churchill,* 483 F.2d 268 (1st Cir. 1973).*

---

* Even had the district court not reached the conclusion it did, the use of Solomon's testimony could still have been upheld on several grounds.

[Footnote continued on following page]

Assuming, but only *arguendo*, that the Fifth Amendment privilege against self-incrimination might apply to the Exchange, Solomon's failure to assert a claim of privilege might be grounds for refusing to hold that his testimony was involuntary. *Cf. United States* v. *Kordel*, 397 U.S. 1, 9 (1970); *London* v. *Patterson*, 463 F.2d 95, 98 (9th Cir. 1972); *United States* v. *Parrott*, 425 F.2d 972, 977 (2d Cir. 1970). The new general immunity statute, 18 U.S.C. §§ 6001-6005, requires that a witness raise a claim of privilege before he may be granted immunity. Moreover, it would be no answer to say that asserting the privilege would have been a useless gesture by Solomon since it would have resulted in expulsion or suspension by the Exchange. The disciplinary provision which is at the heart of appellant's argument, Article XIV, Section 9, of the Exchange Constitution (Br. 52), appears on its face to provide for suspension or expulsion only upon a total failure "to appear and testify." Solomon did appear on May 17. He could well have stated that he would respond to any question the answer to which would not tend to incriminate him but that with respect to certain questions he would raise a claim of privilege. The Exchange, being on notice, could then have decided either to continue with the questioning, and risk possible immunity, or to refrain from questioning. Instead, Solomon gave all appearances of cooperating with the Exchange, and in no way indicated either personally or through his attorney that he felt himself compelled to testify.

In fact, it is very likely that Solomon welcomed the opportunity to appear before the Exchange and that the Exchange disciplinary regulation in Article XIV, Section 9, had no effect whatsoever on his decision to appear. Although Solomon says he was compelled to testify for fear of suspension from the Exchange if he failed to do so, Solomon knew, or could reasonably have expected, that he would be suspended for entirely different reasons. Article XIV, Section 1, of the Exchange Constitution provides that "A member or allied member who shall be adjudged guilty by the affirmative vote of a majority of the Governors then in office, of fraud or of fraudulent acts shall be expelled." Article XIV, section 7, provides for suspension or expulsion if a member is adjudged guilty "of a wilful violation of any provisions of the Securities Exchange Act of 1934 or any rule or regulation thereunder. . . ." Since Kubie and Lynn had already testified before the Exchange, Solomon had no hope of concealing his criminal activity. His suspension or expulsion from the Exchange could not have been averted. Accordingly, he chose to testify not for

[Footnote continued on following page]

POINT II

The indictment in this case was proper.

Solomon argues that if the Court concludes that his Exchange testimony was inadmissible at trial the indictment should be dismissed on the ground that tainted evidence was before the Grand Jury and that no other evidence was presented to support Count seven. The argument is incorrect both on the law and the facts.

Even if Solomon's Exchange testimony were tainted, and even if it were the only evidence before the Grand Jury on Count seven, the indictment would still be valid. It is well settled, and recently reiterated by the Supreme Court, that except in extraordinary circumstances not here present, "the validity of an indictment is not affected by the character of the evidence considered . . . [and] an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence . . . or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination," *United States* v. *Calandra*, 414 U.S. 338, 344-45 (1974); *accord, Lawn* v. *United States*, 355 U.S. 339, 349-50 (1958); *Costello* v. *United States*, 350 U.S. 359, 363 (1956); *United States* v. *Marshall*, 471 F.2d 1051, 1053 (D.C. Cir. 1972); *United*

---

fear of expulsion but because expulsion was inevitable. Indeed charges under these provisions of the Exchange Constitution were filed against Sol Leit by the Exchange (DX L; App. 273-280). Charges substantially similar to those brought against Leit were brought against the other defendants including Kubie, Lynn and Solomon (Tr. 113). Thus Kubie and Lynn, who did testify, and Leit and Levine, who did not, all are subject to expulsion, indicating that the failure to testify was, in this case, an irrelevancy. In this sense, the Court could have concluded that even if the Exchange was invested with governmental attributes, Solomon's testimony was still voluntary, and therefore admissible, within the meaning of the Fifth Amendment.

States v. *Ramsey*, 315 F.2d 199, 199-200 (2d Cir.), *cert. denied*, 375 U.S. 883 (1968); *United States* v. *Gibson*, 310 F.2d 79, 82 (2d Cir. 1962); *United States* v. *Grosso*, 358 F.2d 154, 168 (3d Cir. 1966), *rev'd on other grounds*, 390 U.S. 62 (1968); *United States* v. *Callahan*, 300 F. Supp. 519, 523 (S.D.N.Y. 1969); *Paroutian* v. *United States*, 297 F. Supp. 137, 139 (E.D.N.Y. 1968), *rev'd on other grounds*, 471 F.2d 289 (2d Cir. 1972); *United States* v. *Garcia*, 272 F. Supp. 286, 288 (S.D.N.Y. 1967) (Mansfield, *J.*). The Grand Jury that returned the indictment in this case was neither affirmatively "misled", *United States* v. *Estepa*, 471 F.2d 1132, 1136 (2d Cir. 1972), nor "deceived" as to the nature of the evidence presented to it, *United States* v. *Payton*, 363 F.2d 996, 1000 and n. 1 (2d Cir.) (dissenting opinion), *cert. denied*, 385 U.S. 993 (1966); *cf.*, *United States* v. *Estepa*, *supra*, 471 F.2d at 1137.

In any event, in this case there was ample independent evidence before the Grand Jury on Count Seven.*

---

* The Grand Jury minutes have been sealed and forwarded to this Court. Should the Court reach this question, the Government respectfully asks it to examine pages 55-57 of Robert Lynn's testimony, dated June 28, 1973, and pages 50-54 of Joel Kubie's testimony, dated July 5, 1973. Since there was ample independent evidence before the Grand Jury, the question, seemingly well-settled but discussed hypothetically in *United States* v. *James*, 493 F.2d 323, 326 (2d Cir. 1974), whether an indictment based solely upon testimony obtained in violation of the Fifth Amendment is valid, need not be decided again here.

With respect to Point IV of Solomon's brief, the Government had an independent source for the evidence relating to the charge in Count Seven, a source antedating Solomon's May 17, 1973 testimony. See Joel Kubie's May 10, 1973, Exchange testimony, at 42 (GX 3).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DANIEL J. BELLER,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1974— 614—209—438

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

John D. Gordan III being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 16th day of December, 1974 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

NICKERSON, KRAMER, LOWENSTEIN,
NESSEN, KAMIN & SOLL
919 Third Avenue
New York, New York 10022

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John D. Gordan III

Sworn to before me this

16th day of December, 1974.

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975